114

No. 08-432

Supreme Court, U.S.
FILED
DEC 2 - 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BILLIE THOMPSON AND PATRICIA BROWN,

Petitioners,

vs.

GLADES COUNTY, FLORIDA BOARD OF COUNTY COMMISSIONERS; GLADES COUNTY, FLORIDA, SCHOOL BOARD; HOLLY WHIDDEN GREEN, GLADES COUNTY SUPERVISOR OF ELECTIONS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS TO THE PETITION FOR WRIT OF CERTIORARI

GAVIN W. O'BRIEN, ESQ.
GAVIN W. O'BRIEN, P.A.
Counsel of Record
5704 Holmes Blvd.
Holmes Beach, FL 34217
941-778-9224
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether an influence district can satisfy the §2 requirement of The Voting Rights Act of 1965, i.e., whether influence district claims are viable under §2.

2. Are crossover votes properly considered in assessing a potential vote dilution remedy under Section 2 or the Fourteenth Amendment.

3. Whether the lower court erred in holding that Petitioners' proposed district failed to satisfy the first prong of *Thornburg v. Gingles*, 478 U.S. 30 (1986).

PARTIES TO THE PROCEEDING

All parties in the Court of Appeals are listed in the caption.

Respondents accept Petitioners' statement of parties to the proceeding.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
SUMMARY OF ARGUMENT	1
REASONS FOR DENYING THE WRIT	2
CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

Dillard v. Baldwin County Comm'rs, 376 F.3d 1260 (11th Cir. 2004).....2, 3, 4, 7

Johnson v. DeSoto County Bd. Of Comm., 204 F.3d 1335 (11th Cir. 2000).....7

LULAC v. Perry, 548 U.S. 399 (2006).....6

Osburn v. Cox, 369 F.3d 1283 (11th Cir. 2004).....5

Thornburg v. Gingles, 478 U.S. 30 (1986).....3

STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 5

U.S. Const. amend. XV.....5

42 U.S.C. §1973 .....2, 3, 6

SUMMARY OF THE ARGUMENT

Influence voting districts: The Supreme Court has deliberately declined to address the issue at bar and reiterated its declination.

Crossover voting: The Eleventh Circuit has deliberately declined to address the issue at bar and reiterated its declination.

The Panel Decision attempted to make a new rule of law contrary to judicial policy. The *En Banc* Eleventh Circuit declined to adopt the decision of the Panel.

THOMPSON and BROWN seek to have the Supreme Court impose the Panel Decision upon the Eleventh Circuit and the entire United States.

Constitutional proportionality: The "proposed voting district" will create Constitutional proportionality issues. E.g., it shall discriminate against a Hispanic minority which is larger than Plaintiffs' African American minority.

The present case is not a good vehicle to make new law. The population base of Hendry County is so small that even a change of a few individuals results in statistically skewed percentage figures.

Excellent District decision: The decision of the District Trial Court is exemplary and written with particularity and should stand.

REASONS FOR DENYING THE WRIT

Essentially, THOMPSON and BROWN challenge the Florida at large election system to elect DEFENDANT BOARDS arguing there is an unlawful dilution of African American voting strength. Pet. Br. 2.

The THOMPSON and BROWN propose an "illustrative district" to create an influence district for African Americans. They seek to have an influence district satisfy their §2 claims contrary to prevailing Supreme Court and Eleventh Circuit authority. Pet. Br. 6-7.

The first *Gingles* prong is dealt with by the District Court in its opinion particularizing the facts and the law supporting its opinion that:

> "The Court finds the proposed District 1 is in reality only an ***influence district***." Pet. Br. App. 41. [Emphasis supplied]

Then the District Court deals with the THOMPSON and BROWN argument that the proposed district is "close enough". Pet. Br. App. 41. The District Court specifically recognized that:

> The Eleventh Circuit recently held that an influence district **does not** satisfy the §2 requirement. *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260 (11th Cir. 2004). [Emphasis supplied] Pet. Br. App. 41-42.

The District Trial Court's **totality analysis** is set forth from Pet. Br. App. 47-54 in 11 subparts. In detailed findings the District Court reviewed and

analyzed all relevant legal factors to be considered in voter dilution cases.

E.g., the court found that African Americans are not currently significantly affected or hindered by racial discrimination; that there was no evidence of overt appeals to race or racially sensitive local election issues; that Glades County does not have any official anti-single shot policy; that there is no evidence of any voting practices or procedures proven to exist to have a discriminatory impact upon African Americans. Pet. Br. App. 48-50.

The THOMPSON and BROWN premise: Crossover votes may be used to satisfy the first *Gingles* requirement. This will be a new rule of law regarding an issue on which the Eleventh Circuit and the Supreme Court have recently and purposefully abstained. Pet. Br. App. 41, 85.

The Panel Decision attempted to create a new rule of law for the Eleventh Circuit by applying the crossover vote at the threshold *Thornburg v. Gingles*, 478 U.S. 30 (1986) stage. *En Banc* the Eleventh Circuit declined to accept that decision.

The Eleventh Circuit specifically declined to address this crossover issue in the *Dillard* decision that held a minority influence district impermissible as a §2 remedy. This Court stated:

> "**We leave open** the question of whether a §2 plaintiff can pursue a 'coalition' or 'crossover' dilution claim, i.e., a claim where

> 'members of the minority group are not a majority of the relevant voting population but nonetheless have the ability to elect representatives of their choice with support from a limited but reliable white crossover vote.'" *Dillard*, 376 F.3d at 1269. [Emphasis supplied]

The present case is not a good vehicle to make new law. The population base of Hendry County is so small that even a change of a few individuals results in statistically skewed percentage figures. Pet. Br. App. 41. The demographic numbers are stale and a new decennial census is due in 2010.

The decision of the District Court is exemplary. This Trial Court applied the applicable law to the facts of record, and weighed the evidence and credibility of witnesses. The decision of the Trial Court explained its findings and rationale with commendable particularity.

Additionally, THOMPSON and BROWN failed to raise white crossover voting at the trial as a basis for the sufficiency of their proposed remedial district. Accordingly, the record pertaining to such white crossover voting in the illustrative district is limited. Pet. Br. App. 95. The District Court did not err in declining to consider the white crossover vote in finding the proposed District 1 to be an influence district.

The Constitutional Claims:

With regard to the Fourteenth Amendment claim, the District Court found the record fails to show any inequality of opportunity results from the county's current electoral system. Pet. Br. App. 54.

With regard to the Fifteenth Amendment claim, the District Court found the Eleventh Circuit does not recognize a vote dilution claim under the Fifteenth Amendment citing *Osburn v. Cox*, 369 F.3d 1283, 1288 (11th Cir. 2004). Pet. Br. App. 14, 55.

One essential problem with acceptance of the THOMPSON and BROWN "illustrative district" plan is that they seek to have 10% of the population secure 20% of the seats on the SCHOOL BOARD and on the COUNTY COMMISSION. African Americans are not the largest minority in Glades County; Hispanics are the largest minority population. The trend of African American population is down. Pet. Br. App. 41, 90 at n. 4. The "close enough" rationale utilizing crossover votes does not treat the Constitutional issue of proportionality it creates.

The effect of the THOMPSON and BROWN proposed "illustrative district" shall establish a "safe seat" for a declining minority group to the disadvantage of a growing minority group.

Application of the new rules of law, proposed by THOMPSON and BROWN, to the facts of this case grant a windfall providing effective political power 75

percent above the declining minority group's numerical strength. Pet. Br. App. 102.

THOMPSON and BROWN's proposal is a denial of equal participation in the election process. The proposal does not deal with Constitutional proportionality requirements in current law. See *LULAC v. Perry*, 548 U.S. 399 (2006). The decision of the District Court did take into account the proportionality issues created by THOMPSON and BROWN's proposed "illustrative district" and is consistent with existing precedent which it cites. Pet. Br. App. 54.

CONCLUSION

The Opinion and Order of the District Court is excellent and right on the points raised at bar. This is ***not*** a case about facts. There are no material disputes over essential facts and the District Court's recitation of facts is exemplary.

THOMPSON and BROWN argue for an influence voting district to be judicially authorized for the first time despite prior declinations to do so by the Supreme Court and the Eleventh Circuit. The rationale of these courts is still valid and should be continued.

THOMPSON and BROWN argue that new law should be created to authorize consideration of crossover voting in §2 cases for the first time. The Supreme Court and the Eleventh Circuit have not done

so. The rationale of these courts is still valid and should be continued.

THOMPSON and BROWN argue that their proposed district is "close enough" even if it does not contain a realistic majority because it can be an influence district. This theory has been rejected and should not be accepted now.

This case ***is*** about an issue of law. The law on point is well settled and the Eleventh Circuit precedent settled the law in *Johnson v. DeSoto County Bd. Of Comm.*, 204 F.3d at 1344 and *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260 (11th Cir. 2004).

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GAVIN W. O'BRIEN, ESQ.
GAVIN W. O'BRIEN, P.A.
Counsel of Record
5704 Holmes Blvd.
Holmes Beach, FL 34217
941-778-9224
Counsel for Respondents